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The Architectural Works Copyright Protection Act: Analysis of Probable Ramifications and Arising Issues

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The Architectural Works Copyright Protection Act: Analysis of Probable Ramifications and Arising Issues*

TABLE OF CONTENTS

I. Introduction	873
II. Analysis of Definitions	875
III. Analysis of the New Subject Matter	879
IV. Analysis of Scope of Exclusive Rights in Architectural Works	881
V. The Effect of the Visual Artists Act on Architectural Works	888
VI. Infringement	892
VII. Remedies	895
VIII. Preemption and Effective Date	896
IX. Conclusion	888

I. INTRODUCTION

Architectural works, as expressed and embodied in buildings, architectural plans and drawings, stand protected as subject matter of copyright, effective December 1, 1990. On that date, President Bush signed legislation¹ that created a new category of protectable subject matter for architectural works.² The new law, entitled the Architec-

* This Comment received first prize in the Nathan Burkan Memorial Competition in copyright law at the University of Nebraska-Lincoln College of Law. The competition is sponsored by the American Society of Composers, Authors and Publishers.

1. The enacted legislation which contained the added protection for architectural works is the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) [hereinafter Judicial Improvements Act].

2. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, tit. 7, 104 Stat. 5133 (1990). The legislation began as H.R. 5498, 101st Cong., 2d Sess. (1990), which was introduced by Congressman Robert W. Katsenmeier, who chaired the House Subcommittee on Courts, Intellectual Property and the Administration of

tural Works Copyright Protection Act,³ effects changes that were determined necessary to fulfill requirements of the Berne Convention, to which the United States became a signatory on March 1, 1989.⁴

In response to Congressional inquiry, the Register of Copyrights reported that architectural blueprints and models and artistic features separable from the overall shape of three-dimensional works were adequately protected by United States copyright law. On the other hand, the Register said, the adequacy of protection of "works of architecture" (*i.e.*, buildings) remained in doubt.⁵ Since Article 2(1) of the Berne Convention included "works of architecture," the Register suggested that United States law might not fully comply with the convention.⁶

The Architectural Works Copyright Protection Act (Architectural Works Act) implements one of the four solutions suggested by the Register of Copyrights to bring the United States law in compliance with the Berne Convention.⁷ The implemented solution recommended that Congress "[c]reate a new subject matter category for works of architecture in the Copyright Act and legislate appropriate limitations."⁸

This Comment will examine the Architectural Works Act's changes and additions to current copyright law. The changes and ad-

Justice. Mr. Katsenmeier's career in Congress spanned 32 years during which he was aggressively involved in intellectual property law. His career came to a close after Mr. Katsenmeier was defeated in November, 1990, in a bid for re-election.

3. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, tit. 7, 104 Stat. 5133 § 701 (1990).

4. THE REGISTER OF COPYRIGHTS, Copyright in Works of Architecture, 221 (June 19, 1989) [hereinafter Copyright Report].

5. *Id.* at 221-22.

6. *Id.* at 221. Similar uncertainty led to exclusion of works of architecture from protection under the Berne Implementation Act of 1988. In developing the Implementation Act, Congress adopted a "minimalist approach" and, for the most part, made only changes necessary to join the convention. Professor Paul Goldstein and former Register of Copyrights Barbara Ringer testified to a House subcommittee that United States' adherence to the convention might not require express legislative protection for works of architecture. Based on the uncertainty about whether the legislation needed to include additional protection of works of architecture, Congress decided not to include express protection. Instead, Congress requested the Register of Copyrights to conduct a study. The study is not reflected in the Copyright Report.

7. *Id.* at 223.

8. *Id.* The three other suggested solutions were: (a) "[a]mend the Copyright Act to give the copyright owner of architectural plans the right to prohibit unauthorized construction of substantially similar buildings based on those plans;" (b) "[a]mend the definition of 'useful article' in the Copyright Act to exclude unique architectural structures;" and (c) "[d]o nothing and allow the courts to develop new legal theories of protection under existing federal statutory and case law, as they attempt to come to grips with U.S. adherence to the Berne Convention and allow the various state court remedies to develop." *Id.* at 224-25.

ditions studied will include both those explicitly made by the Act and those likely to be created by judicial enforcement and interpretation of the Act. Regarding each addition, change and modification, this Comment will address some of the problems and issues likely to arise. In the course of this analysis, this Comment will propose solutions to the problems and issues likely to arise.

II. ANALYSIS OF DEFINITIONS

The Architectural Works Act amends the Copyright Act's definitions section, section 101, by including the definition of an "architectural work."⁹

An "architectural work" is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.¹⁰

"What is a building?" is perhaps the first question that comes to mind upon reading the new definitional section.¹¹ The House Judiciary Committee, anticipating this preliminary inquiry, urged that the term "building" includes habitable structures like residences and office buildings and also covers structures that are used by people, but not inhabited, such as churches, gazebos and pergolas.¹²

Before the legislation reached the committee, the Subcommittee on Courts, Intellectual Property and the Administration of Justice amended the definition of architectural works by deleting the term "three-dimensional structure" which supplemented "building."¹³ The Subcommittee feared interpretation of "three-dimensional structures" might include works like highway bridges, canals, dams and sidewalks, and it determined that copyright protection of such works—some forming important elements of the nation's transit system—was not needed to stimulate creativity or prohibit unauthorized reproduction.¹⁴

Between the works intended to be included—houses and gazebos—

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9. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, tit. 7, 104 Stat. 5133 § 702(a)(1990). Title 7, § 702(a). Section 703 of title 7 creates the new subject matter category and amends section 102(a) of title 17, United States Code.
 10. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, tit. 7, 104 Stat. 5133 § 702(a)(1990).
 11. Goldberg & Bernstein, *Legislation by the 101st Congress*, N.Y.L.J., Jan. 18, 1991, at 3.
 12. H.R. REP. NO. 735, 101st Cong., 2d Sess. 20 (1990).
 13. *Id.* The phrase "three-dimensional structures" was included in H.R. 3990, 101st Cong., 2d Sess. (1990), the predecessor of H.R. 5498, 101st Cong., 2d Sess. (1990), and in the version of H.R. 5498 that reached the subcommittee. Protection for nonhabitable three-dimensional structures was not required by the Berne Convention.
 14. H.R. REP. NO. 735, 101st Cong., 2d Sess. 20 (1990).

and those not intended to be included—bridges and dams—exist a number of structures that may or may not be “buildings.” Questions remain as to whether such works as swimming pools, ponds,¹⁵ parking garages, bandshells, barns, grain silos, walls¹⁶ high tombs,¹⁷ windmills and paddlewheels¹⁸ are “buildings” for copyright purposes.

A “building” is defined by one architectural dictionary as “a structure of some elaboration, especially, in architectural usage, a dwelling house, hall for meeting, place of worship, or the like.”¹⁹ “Building” differs from “architecture” in its exclusion of “all idea of artistic treatment. . . . [A building] may be commonplace, ugly, insufficient, or otherwise of small importance.”²⁰

As defined, while the term “building” particularly encompasses works like houses and churches, it also covers structures of lesser elaboration and detailed planning. A legal definition for copyright purposes of the word “building” should include all three-dimensional structures that are fixed at a certain site. Perhaps the Judiciary Committee is correct in excluding important elements of the nation’s transportation system, like highway bridges and canals. Certainly, the public safety demands state of the art planning and engineering of roads and travelled waterways. But the public transportation exception to the category of architectural works defined as “buildings” should be narrowly construed. Outside the exception, all three-dimensional products of architectural planning should fit the “building” definition.

Another preliminary question that deceptively may appear simple is who will be the copyright owner of architectural works. Will it be the architect, her firm or the party commissioning her, or will it be the builder of the work? In countries where architectural works are protected, generally the architect, who created the plans, is considered the author of both the plans and the structure.²¹ The builder of the work, on the other hand, is viewed as part of the process of producing the structure.²² In those countries, the party commissioning the work, however, may stand a better chance of being deemed the author under

15. Note, *Copyright Protection for Architecture and the Berne Convention*, 65 N.Y.U. L. REV. 403, 419 (1990) (authored by Natalie Wargo) [hereinafter Wargo] (citing *Vincent v. Universal Hous. Co.*, 1928 MacG. Cop. Cas. 275 (U.K.)).

16. *Id.*

17. 3 R. STURGIS’ ILLUSTRATED DICTIONARY OF ARCHITECTURE AND BUILDING 816 (Unabridged Reprinting of the 1901-02 ed. 1989) [hereinafter STURGIS’ ILLUSTRATED] (“High Tomb. One raised from the floor instead of being a mere slab in-laid in the pavement.”)

18. Wargo, *supra* note 15, at 421 n.96 (citing 6 EUR. COM. CAS. 59, 66 (1983)).

19. 1 STURGIS’ ILLUSTRATED, *supra* note 17, at 384.

20. *Id.*

21. Wargo, *supra* note 15, at 423.

22. *Id.* at 424.

concepts resembling "work for hire."²³ An international committee, evaluating the appropriate protection of architectural works, suggested that the architect must be considered the author.²⁴ Current United States law generally comports with the notion that the party commissioning the works is not the author or initial copyright owner of the work.²⁵ Instead, either the architect or her firm is considered the work's author.²⁶ This thinking undoubtedly would extend the architect's or firm's authorship to the actual building. Any other placement of authorship of the building would defeat the intent behind the Architectural Works Act.²⁷ In sum, the Architectural Works Act should extend the protection provided by traditional United States copyright law to the architect or architectural firm as the author of and initial owner of copyright in architectural plans, drawings, models and the building.

Beyond these preliminary issues, the new definition of "architectural works" has two components.²⁸ First, it sets forth that the "design of a building" is what is to be protected. The term "design"—which is the work being protected—includes "the overall form as well

23. *Id.*

24. *Id.* at 441 (citing *Oeuvres d'architecture: Document Préparatoire pour le Comité d'experts gouvernementaux OMPI/Unesco et rapport de ce Comité*, 99 D.A. 363, 364 (1985)).

25. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989); see also *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252, 257-58 (D. Neb. 1982) (The *Aitken* court decided that, where the company employed to construct an apartment complex did not have the right to exercise control over the architectural firm, the firm was independent contractor and not an employee of the company and thus ownership of copyright vested in the architectural firm.)

The client is unlikely to be considered a joint or sole author unless it actively and substantially participates in the creation of the designs. Additionally, to avoid risking that the party commissioning the architect might enjoy authorship rights under a work for hire theory, many architects prior to the CCNV decision included in their contracts a clause explicitly stating that the plans will remain the architect's property. See *Joseph J. Legat Architects v. United States*, 625 F. Supp. 293 (N.D. Ill. 1985); *Meltzer v. Zoller*, 520 F. Supp. 847 (D.N.J. 1981) (architectural firm, not homeowner, ruled the author).

Similarly, a provision retaining for the architect copyright in the plans and final structure could also be included in the contract.

26. See *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 258-59 (D. Neb. 1982).

27. It is "architecture" that is frequently referred to in H.R. REP. NO. 735, 101st Cong., 2d Sess. 20 (1990) as deserving the protection of copyright, not building or constructing, and clearly not the commissioning of architecture. For example: "Architecture is a form of artistic expression that performs a significant societal purpose . . ." H.R. REP. NO. 735, 101st Cong., 2d Sess. 20 (1990).

The Architectural Works Act puts teeth into the protection of the rights of architects by extending protection to the finished structure. Architects, not builders or land owners, now will have more incentive to create plans, knowing the design will be protected even after the building is constructed.

28. H.R. REP. NO. 735, *supra* note 12, at 18.

as the arrangement and composition of spaces and elements in the design."²⁹ The "overall form" should simply be construed to mean the overall appearance of the building.³⁰ The "arrangement and composition of spaces and elements" should include things like dimensions and configuration and location of rooms, doors, windows and closets.³¹ Protection should cover both the interior and exterior of the work.³² While individual and nonoriginal elements, such as skylights, bedrooms, atriums, domes and basic shapes, should remain unprotected,³³ the elements may, by original configuration and coordination, form a protectable whole.³⁴

Even original design elements should not be protected as architectural works.³⁵ Instead, they should be treated as "pictorial, graphic, and sculptural works,"³⁶ which will undoubtedly be subjected to a separability test as useful articles.³⁷ Clearly, under such a test, original designs of gargoyles, stained glass windows, bas-relief bronze doors, and similar works would be protectable.³⁸ Elements that do not pass

29. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, tit. 7, 104 Stat. 5133 (1990). See also *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109 (9th Cir. 1970).

30. Shipley, *Copyright Protection for Architectural Works*, 37 S.C.L. REV. 393, 428 (1986)[hereinafter Shipley].

31. *Id.* at 428, 435.

32. *Id.* See also H.R. REP. NO. 735, *supra* note 12, at 18.

33. Shipley, *supra* note 30, at 445.

34. *Id.* See also H.R. REP. NO. 735, *supra* note 12, at 18.

35. See Note, *Innovation and Imitation: Artistic Advance and the Legal Protection of Architectural Works*, 70 CORNELL L. REV. 81, 96 (1984)(authored by Elizabeth A. Brainard)[hereinafter Brainard]. Brainard writes:

Prohibiting the copying of an entire design from a completed structure protects an architect's future economic interest in a design while eliminating only the mindless copying that thwarts rather than promotes artistic progress. A completed structure, however, also presents the fullest opportunity for other architects to examine and analyze a design and to engage in carefully considered borrowing of discrete design elements. Therefore, to best serve progress in architectural design, wholesale copying of completed structures should be prohibited, but protection should not preclude the selective borrowing of design elements within a completed structure.

36. 17 U.S.C. § 102(a)(5)(1989).

37. See *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145-46 (2d Cir. 1987). See also Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707, 741 (1983).

38. Shipley, *supra* note 30, at 427 n.184 and accompanying text. Professor Shipley avers that "such works (i.e., gargoyles, stained glass windows and bas-relief bronze doors) should be treated as features added to a structure, which are capable of existing separately from the building's utilitarian purpose."

Shipley made this point to explain how buildings sufficiently embellished with separable ornate carvings and decorating could be protectable, while simple, Bauhaus-style buildings could not. Shipley objected to this distinction when made for the purpose of determining whether to protect a building.

The point here is that gargoyles, stained glass windows and the like may very

the separability test, on the other hand, would not be protectable.

Second, the definition states that the protected design may be "embodied in any tangible medium of expression." The definition specifies certain approved media as the "building" itself, "architectural plans," and "drawings." Other media undoubtedly qualifying for protection are models, elevations, blueprints and renderings of architectural works, and computer data and programs for designing and three-dimensional drafting.³⁹

The above specification of architectural plans and drawings oddly makes the media protected under two subject matter definitions—as "architectural works" and, as two-dimensional works under the "pictorial, graphic, and sculptural works category." The Judiciary Committee said this double protection was intentional.⁴⁰ "An individual creating an architectural work by depicting that work in plans or drawing will have two separate copyrights. . . . Either or both of these copyrights may be infringed and eligible separately for damages."⁴¹ The Committee added that courts or juries may reduce a damages award to avoid double recovery.⁴² Other questions that may arise with respect to the double protection will be addressed below in Part VIII.⁴³

III. ANALYSIS OF THE NEW SUBJECT MATTER

Creation of the new category of copyright subject matter takes "architectural works" out of the category of pictorial, graphic and sculptural works. Therefore, the useful articles restriction, which applies to pictorial, graphic and sculptural works, and the confounding separability test will no longer apply to architectural works.⁴⁴

well be separable from the building—perhaps both conceptually and physically. If, standing by itself, the element meets the separability test, then it may be protected as a pictorial, graphic or sculptural works.

39. See H.R. REP. NO. 735, *supra* note 12, at 19. See also Letter from G. William Quatman and Mark E. Brown to the Office of Register of Copyrights (Sept. 16, 1988), at 1-2 [hereinafter Quatman Letter](responding to Notice of Inquiry, 53 Fed. Reg. 21,536 (1988)[hereinafter Notice of Inquiry], reprinted in Copyright Report, *supra* note 4, at app. B.), reprinted in Copyright Report, *supra* note 4, at app. C.

40. 17 U.S.C. § 102(a)(5)(1989).

41. H. R. REP. NO. 735, *supra* note 12, at 19.

42. *Id.*

43. See *infra* notes 154-58 and accompanying text.

44. See H.R. REP. NO. 735, *supra* note 12, at 20. See also Note, *The Effect of the Berne Implementation Act of 1988 on Copyright Protection for Architectural Structures*, 1990 U. ILL. L. REV. 151, 173 (1990)(authored by Dawn M. Larsen)[hereinafter Larsen].

Architectural works no longer fall under 17 U.S.C. § 102(a)(5) as pictorial, graphic or sculptural works. The new "architectural works" category is at 17 U.S.C. § 102(a)(8).

Although architectural works are no longer subject to separability scrutiny, the question remains as to how to determine their copyrightability. Many commentators endorse application of the basic originality test to architectural works and point to the law of other countries to show that such a standard has not resulted in absurd overinclusiveness.⁴⁵ Some other countries, however, impose a higher standard of originality because of the useful and technical nature of architectural works.⁴⁶

The Judiciary Committee suggested a two-step analysis to evaluate the copyrightability of architectural works. The first step calls for the determination of whether the work is "original."⁴⁷ After this basic—non-heightened—originality test, the second step of the envisioned analysis involves an examination of the work to see if the design elements are functionally required. "If the design elements are not functionally required, the work is protectable without regard to physical or conceptual separability."⁴⁸ This second step realizes the unique and inherent functional nature of architectural works and makes copyright protection a little harder to get for such works.

In determining copyrightability of architectural works, courts should apply only the basic test for originality.⁴⁹ The second step sug-

45. Hellmuth, *Obsolescence Ab Initio: The New Act and Architectural Copyright*, 22 BULL. COPYRIGHT SOC'Y, 169, 173-74 (1975); Wargo, *supra* note 15, at 438 and 472. Larsen, *supra* note 44, at 164-65 (Larsen, however, does point to Great Britain's system as being overinclusive. British cases have protected blueprints of a lavatory pan connector, automobile exhaust pipes and plastic drawer systems. Larsen opines that "careful wording of United States copyright law so as not to protect designs dictated solely by function could avoid the problem of overinclusiveness.")

But see Comment, *Reinforcing the Foundation: The Case Against Copyright Protection for Works of Architecture*, 39 EMORY L.J. 1261, 1288 (1990) (authored by James Bingham Bucher) [hereinafter Comment]. In his comment, Bucher writes:

If Congress applies the ordinary copyright standard of originality, then every building created free from the influence of other architects would be copyrightable. However, many architects are both consciously and subconsciously influenced by others. Thus, it would be nearly impossible to determine which architectural works are truly original and hence copyrightable.

46. Wargo, *supra* note 15, at 438.

47. H.R. REP. NO. 735, *supra* note 12, at 20.

48. *Id.* at 21.

49. See *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103-02 (2d Cir. 1951). The *Alfred Bell* court held:

It is clear, then, that nothing in the Constitution commands that copyrighted matter be strikingly unique or novel. . . . All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.' Originality in this context 'means little more than a prohibition of actual copying.' No matter how poor artistically the 'author's' addition, it is enough if it be his own.

gested by the Judiciary Committee creates confusion which creation of the new subject matter category should avoid. If the design elements were functionally required, then the work would slip from protection as an architectural work.⁵⁰ Instead, it would have to seek cover under the ambit of protection afforded pictorial, graphic and sculptural works. As such, the useful article separability test would be applied. And we would be back where we started before the Architectural Works Act.

IV. ANALYSIS OF SCOPE OF EXCLUSIVE RIGHTS IN ARCHITECTURAL WORKS

Perhaps the leading argument of proponents and instigators of new legislation protecting architectural works was the need to protect the three-dimensional products of architectural planning.⁵¹ A brief sketch of case law prior to the passage of the Architectural Works Act will be helpful in understanding this argument and its incorporation into the Act. First, the protection of architectural plans must be examined. The next inquiry will focus on the protection of the right to build from those plans. Finally, protection of completed buildings will be studied.

For the most part, architectural plans, as well as other works like blueprints and models, were adequately protected by copyright law prior to passage of the Architectural Works Act. Architectural plans are expressly included in the definition of pictorial, graphic and sculptural works.⁵² The courts consistently have affirmed protection of architectural plans against infringement.⁵³

See also 1 M. NIMMER, NIMMER ON COPYRIGHT § 2.01[A] (1990); Robert R. Jones Assocs., Inc., v. Nino Homes, 858 F.2d 274, 278 (6th Cir. 1988); Demetriades v. Kaufmann, 680 F. Supp. 658, 662 (S.D.N.Y. 1988).

50. It is difficult to imagine a building that comprises design elements that are not functionally required. Some or many or most or all elements may be functionally required. Even if all elements are functionally required, their combination and configuration may be original and would therefore justify protection. See Note, *Standing on Shaky Ground: Copyright Protection for Works of Architecture*, 6 ART & L. 70, 71 (1981)(authored by Erika White) [hereinafter White].
51. See *supra* notes 4-6 and accompanying text. See also Copyright Report, *supra* note 4, at 221-22; Shipley, *supra* note 30, 410; Brainard, *supra* note 35, at 96; Letter from Christopher A. Meyer, on behalf of the American Institute of Architects (AIA), to Ralph Oman, Register of Copyrights (Sept. 16, 1988), at 7 [hereinafter AIA Letter](responding to Notice of Inquiry), reprinted in Copyright Report, *supra* note 4, at app. C; Comments of Frank Lloyd Wright Foundation to the U.S. Copyright Office Notice of Inquiry on Architectural Work Protection, at 11-12 [hereinafter Wright Letter], reprinted in Copyright Report, *supra* note 4, at app. C; Comment, *supra* note 45, at 1290.
52. 17 U.S.C. § 101 (1989).
53. See Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co., 542 F. Supp. 252, 261 (D. Neb. 1982); Herman Frankel Org. v. Tegman, 367 F. Supp. 1051, 1053 (E.D.

The protection of the right to build from architectural plans—also known as the execution right—remained the subject of debate at the time the Architectural Works Act was enacted. Most courts have held that an owner of copyright in architectural plans cannot prevent others from building according to the plans.⁵⁴ Some commentators and courts have suggested that a structure is not a “copy” of its plans, and therefore building from a copyrighted plan is not copying or infringement.⁵⁵ Most courts, in denying protection, have focused on the nature of buildings as useful articles.⁵⁶ Recently, however, a court significantly expanded copyright protection of architectural works and proscribed the use of infringing plans to construct a building.

In *Robert R. Jones Associates v. Nino Homes*,⁵⁷ the plaintiff was a custom home builder who distributed to potential buyers brochures that contained abridged floor plans of one of the plaintiff's custom-designed houses. The plaintiff alleged that the defendant copied these plans and subsequently constructed seven houses that were substantially similar to the plans. The evidence clearly showed that the defendant had “copied” the plaintiff's plans and infringement was easily established. In the course of determining appropriate damages, the Sixth Circuit Court of Appeals ruled that “one may construct a house which is identical to a house depicted in copyrighted architectural plans, but *one may not directly copy those plans and then use the infringing copy to construct the house.*”⁵⁸

The court concluded that recoverable damages included the losses suffered as a result of the defendant's use of the infringing copies—the construction of the seven houses. While *Nino Homes* marks one circuit's movement toward extending copyright protection to the execu-

Mich. 1973)(a person should be able to prevent another from copying copyrighted house plans and using them to build a house).

54. See *Demetriades v. Kaufman*, 680 F. Supp. 658, 666 (S.D.N.Y. 1988) (“construction of a building imitating that depicted in copyrighted architectural plans does not, consistent with *Baker v. Selden*, 101 U.S. 99 (1879)], constitute infringement of those plans”); *Herman Frankel Org. v. Tegman*, 367 F. Supp. at 1053; *Scholz Homes, Inc. v. Maddox*, 379 F.2d 84, 85 (6th Cir. 1967); *Imperial Homes Corp. v. Lamont*, 458 F.2d 895, 899 (5th Cir. 1972); *DeSilva Constr. Corp. v. Herrald*, 213 F. Supp. 184, 196 (M.D. Fla. 1962); *Schuchart & Assoc. v. Solo Serve Corp.*, 540 F. Supp. 928, 948 (W.D. Tex. 1982).

55. See Shipley, *supra* note 30, at 403.

56. See *Demetriades v. Kaufmann*, 680 F. Supp. at 664. The *Demetriades* court reasoned:

[A]lthough an owner of copyrighted architectural plans is granted the right to prevent the unauthorized copying of those plans, that individual, without benefit of a design patent, does not obtain a protectable interest in the useful article (the building) depicted by those plans.

See also *Scholz Homes Inc. v. Maddox*, 379 F.2d at 85; *Imperial Homes Corp. v. Lamont*, 458 F.2d at 899.

57. *Robert R. Jones Assoc. Inc. v. Nino Homes*, 858 F.2d 274 (6th Cir. 1988).

58. *Id.* at 280 (emphasis added).

tion right, no other circuit's have followed suit. Thus, the protection of the right to build remained limited prior to the passage of the Architectural Works Act.

Protection of the completed building was for all practical purposes nonexistent. As useful articles, most buildings were subjected to and failed the separability test.⁵⁹ Under the 1976 Act and common law copyright law, the only structures passing the test were monuments⁶⁰ and perhaps buildings embellished with decorative ornaments—such as gargoyles and stained glass windows⁶¹—and very aesthetically and artistically unique buildings like the Guggenheim Museum. The list of protected buildings was short at best. No court proscribed copying—either in drawing plans or constructing—of a non-monumental building. The *Nino Homes* court, for instance, expressly rejected the idea of preventing copying of the building itself.

The lack of protection for the right to build and of the buildings themselves drew considerable criticism⁶² and is perhaps the primary reason for the Architectural Works Act.⁶³ Critics focused on the significance of the right to build as forming the essential economic value of architectural planning.⁶⁴ Absent a right to build and to prevent in-

59. See *supra* note 38 and accompanying text. The House Report on the Copyright Act of 1976 hinted that the separability test would exclude most architectural works other than plans, drawings and the like:

[T]he extent to which [copyright] protection would extend to the structure depicted would depend on the circumstances. Purely non-functional or monumental structures would be subject to full copyright protection under the bill, and the same would be true of artistic sculpture or decorative ornamentation or embellishment added to the structure. On the other hand, where the only elements of shape in an architectural design are conceptually inseparable from the utilitarian aspects of the structure, copyright protection for the design would not be available.

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 55 (1976).

60. *Id.* See *Jones Bros. Co. v. Underkoffler*, 16 F. Supp. 729, 731 (M.D. Pa. 1936) (memorial entitled to copyright because it was an object of art as well as an article of manufacture).

One court, on the other hand, even determined that a monumental work was functional. See *Wickham v. Knoxville Int'l Energy Exposition, Inc.*, 555 F. Supp. 154, 156 (E.D. Tenn. 1983) ("economic and engineering considerations dictated the height and structural steel design of the Sunsphere Tower").

61. Shipley, *supra* note 30, at 427 n.184.

62. *Robert R. Jones Assoc. v. Nino Homes*, 858 F.2d 274, 280 n.5 (6th Cir. 1988) (the same result would not necessarily obtain if the alleged infringer merely made houses which were substantially similar to the house depicted in the copyrighted plans).

63. See *supra* note 51.

64. *Id.* See also *Larsen, supra* note 44, at 152 ("Architects may have no incentive to expend the considerable time and effort necessary to create an original design if, once constructed, others may freely exploit that design."). Cf. Comment, *supra* note 45, at 1267-71 (discussing the significance of the market as an incentive mechanism for creating architectural design).

fringing construction, the effectiveness of copyright protection of architectural works was sharply diminished. Professor Shipley wrote that "[b]ecause the value of architectural plans depends in part on control over the right to build, [protection of plans but not buildings] renders copyright protection almost meaningless unless the architect can mass market his blueprints."⁶⁵ Another commentator thoughtfully stated, "[i]t is ironic that the absence of economic incentives which would otherwise result from protection undoubtedly concerns the many architects designing residential and commercial structures more than the few who are commissioned to design monuments or other essentially nonfunctional works."⁶⁶

The Architectural Works Act retrieves architectural works from the definition of useful articles⁶⁷ and puts an end to the argument that a completed structure is not a "copy."⁶⁸ The Act, however, provides little guidance as to the scope of the copyright owner's exclusive rights in her architectural works. What guidance the Act provides comes in the shape of limitations on the exclusive rights.⁶⁹ But before discussing these limitations, examination of the exclusive rights that should exist, and likely will exist, is in order.

First, the right to reproduce the copyrighted architectural works.⁷⁰ This right forms perhaps the most significant protection for owners of copyright in architectural works. With respect to architectural works, there are four types of reproduction: (1) copying of plans in the form of other plans;⁷¹ (2) copying a building in the form of another building, when construction is based on only visual inspection of the copied building; (3) copying plans in the form of a building—execution; and (4) copying a building in the form of plans, when the plans are made based on only visual inspection of the copied building.⁷²

The first type of reproduction—copying plans from other plans—as demonstrated above, was adequately protected before passage of the Architectural Works Act.⁷³ Under the Act, there will be little, if any

65. Shipley, *supra* note 30, at 410.

66. Brainard, *supra* note 35, at 98.

67. See H.R. REP. NO. 735, *supra* note 12, at 20. The report states:
[b]y creating a new category of protectible [sic] subject matter. . . , and, therefore, by deliberately not encompassing architectural works as pictorial, graphic, or sculptural works. . . , the copyrightability of architectural works shall not be evaluated under the separability test applicable to pictorial, graphic, or sculptural works embodied in useful articles.

68. See *supra* note 55 and accompanying text.

69. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, tit. 7, 104 Stat. 5133 § 704 (1990). See *infra* notes 81-91 and accompanying text.

70. 17 U.S.C. § 106(1)(1989).

71. Throughout the remainder of this section, "plans" include plans, sketches, drawings, renderings, models and the like.

72. See Wargo, *supra* note 15, at 427 n.133, and 441.

73. See *supra* notes 52-53 and accompanying text.

change in the protection of this reproduction right.

The second type of reproduction—copying a building from another building—was never protected, with exception once made for cemetery memorials.⁷⁴ This type of reproduction, where the copy is based only upon inspection of the original building itself and not upon any plans, is also referred to as “reverse engineering.”⁷⁵ Under the Architectural Works Act, this type of reproduction should be protected. In other words, copying of a building, when the copying is not authorized by the copyright owner, will constitute infringement.

Courts may not be receptive to this idea, but the new law as written provides little ground for arguing that this right of reproduction should not be protected like any other right of reproduction. In fact, this right may need the most protection. Access to a building—the interior and especially the exterior—to observe and inspect the floor plan arrangement and the configuration of design elements seems far more easily obtained than obtaining access to the plans themselves. Reverse engineering itself may be the easiest form of reproduction. While copying of the building may not be precise, there is no reason to doubt that it could be substantially similar. Thus, the second type of reproduction should find protection under the Architectural Works Act.

The third type of reproduction right—copying (executing) plans in the form of a building—is the type of right the Sixth Circuit Court of Appeals in *Nino Homes* moved toward protecting.⁷⁶ While, before passage of the Architectural Works Act, no other circuits followed the lead of *Nino Homes*, there is no reason for any reluctance now. The arguments that buildings are useful articles and are not “copies” of plans has been precluded by the definitional section of the Act.⁷⁷

Finally, the fourth type of reproduction—making plans based only upon visual inspection of the building—was never before an issue. The right to this type of reproduction probably did not exist for the same reason the reverse engineering right was not protected.⁷⁸ Under the Architectural Works Act, the right to this type of reproduction

74. See *supra* note 60 and accompanying text. Before passage of the Architectural Works Act, copying of buildings was not an infringement because the architectural design as embodied in the building was unprotected.

75. Larsen, *supra* note 44, at 151 n.5.

76. See *supra* note 58 and accompanying text. Even *Nino Homes* did not protect absolutely the execution right. Execution was only protected if the plans were copied in the form of other plans and then executed.

77. See *supra* notes 54-55 and 67-68 and accompanying text.

78. See *supra* notes 74-75 and accompanying text. Because the architectural design in the building was unprotected, unauthorized copying of this design—as long as copyrighted plans were not used—in any media, including plans, would not constitute infringement.

should also be protected because buildings themselves are protected.⁷⁹

Beyond the exclusive right of reproduction, the owner of copyright in architectural works will also enjoy exclusive rights to prepare derivative works, to distribute copies of the work and to display the work publicly.⁸⁰ These rights, however, will be significantly limited by two provisions of the Architectural Works Act. Analysis and discussion of these provisions is appropriate and necessary at this point.

The first limitation states:

The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.⁸¹

This limiting provision is unambiguous and its concept was popularly supported prior to passage of the Architectural Works Act by respondents to an inquiry by the Register of Copyrights.⁸² The limitation helps achieve a balancing of the interests involved and inherent in architectural works. As a whole, the Architectural Works Act recognizes and significantly enhances the interests of the architect as the copyright owner. The pictorial representation limitation protects the interests of the public and of other architects. The public still will be able to photograph buildings and houses that catch their eyes on a Sunday drive. Movie directors won't feel inhibited in filming scenes in neighborhoods where protected houses stand. Architects will not be denied the opportunity to sketch or photograph buildings so that they may borrow design elements and ideas.⁸³ Obviously, such uses might infringe upon the copyright owner's rights of display and distribution, absent the limitation.⁸⁴

79. While unauthorized reproduction in the form of detailed plans or blueprints should be prohibited, less detailed pictorial representations of the building should not and cannot be prohibited. See *infra* note 81 and accompanying text.

80. 17 U.S.C. § 106(2),(3) and (4)(1989).

81. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, Title 7, § 704(a), 104 Stat. 5133 (1990)(adding section 120(a) to title 17, United States Code).

82. See generally Copyright Report, *supra* note 4, at apps. B and C. See, e.g., AIA Letter, *supra* note 51, at 8-9.

83. But see *supra* note 79 and accompanying text.

84. For example, the Copyright Act of 1976 definition of "display" includes showing a copy of the work by means of a film. To "display publicly" means to do so in a place open to the public or at any place where a substantial number of people, other than family and friends, is gathered. See 17 U.S.C. § 101 (1989). The pictorial representation limitation assures that a movie that displayed a home, which embodied a protected design, would not constitute an infringement.

Of course, the fair use exception would likely protect the movie absent the new provision. In that vein, the new provision acts as another express fair use-type limitation. See H.R. REP. NO. 735, *supra* note 12, at 21-22. ("Given the important public purpose served by these uses and the lack of harm to the copyright

The second limiting provision states:

Notwithstanding the provisions of section 106(2) (the right to prepare derivative works), the owners of a building embodying an architectural work may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building.⁸⁵

This provision clearly expresses that the copyright owner's right to prepare derivative works cannot be imposed to prevent the building owner from destroying the building or making additions and alterations to the building—whether they be necessary for construction or just to suit the building owner's desires. It also seems to preclude recognition of the author's moral rights—if any exist—in the building.⁸⁶ Like the pictorial representations limitation, the second limitation helps maintain a balance of interest. As mentioned, the Architectural Works Act enhances the protection provided for the architect's rights and interest. For instance, one such right is the authority to seek injunctive relief to prevent infringement.⁸⁷ The alterations and destruction limitation counterbalances the copyright owner's injunctive relief authority by giving the building owner flexibility in deciding what to add to or subtract from his building.⁸⁸ The limitation, in other words, strikes a balance between the property interests of the building owner and the intellectual property interests of the copyright owner.

The limitation on the copyright owner's derivative works rights seems to comport with the attitude of most commentators, who generally agreed that the author of the work should not be allowed to invoke moral rights to prevent alteration or destruction.⁸⁹ The commentators suggested that, absent new moral rights protection, if the architect wished to limit the building owner's right to alter or destroy, then such limitations should prudently be provided for by con-

owner's market, the Committee chose to provide an exception, rather than rely on the doctrine of fair use. . .")

Furthermore, the express language of the new provision indicates limitation of the public display and distribution rights. *See supra* note 81 and accompanying text.

85. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, tit. 7, § 704(a), 104 Stat. 5133 (1990)(adding § 120(b) to title 17, United States Code.

86. *But see infra* note 117 and accompanying text.

87. For example, to enjoin construction according to infringing plans or to have a structure demolished. *See infra* notes 145-52 and accompanying text.

88. *See* H.R. REP. NO. 735, *supra* note 12, at 14.

89. *See* Letter from Professor David E. Shipley to Library of Congress, Copyright Office (Sept. 10, 1988), at 3 [hereinafter Shipley Letter](responding to Notice of Inquiry), reprinted in Copyright Report, *supra* note 4, at app. C ("Absent recognition of moral rights in the United States, the owner of intellectual property rights in an architectural work who conveys all of those rights to another should not have the right to prohibit alterations to the work.") *See also* Quatman Letter, *supra* note 39, at 14; AIA Letter, *supra* note 51, at 8; Wright Letter, *supra* note 51, at 6; Wargo, *supra* note 15, at 476.

tract.⁹⁰ Professor Shipley was the only respondent to the Notice of Inquiry who mentioned that the architect's right to prevent alterations might be available by retaining the right to prepare derivative works.⁹¹ The new provision foreclosed that possibility.

In sum, the alterations and destruction limitation precludes the architect's right to prevent creation of derivative works which are uses of the original building. On the other hand, the limitation does not preclude the right to prevent preparation of derivative works which are other buildings based on the original building.

V. THE EFFECT OF THE VISUAL ARTISTS ACT ON ARCHITECTURAL WORKS

The Visual Artists Rights Act of 1990,⁹² which creates a new subject matter category entitled "works of visual art," was passed in conjunction with the Architectural Works Act.⁹³ The Visual Artists Act creates moral rights of attribution and integrity for the author of works of visual art.⁹⁴ Works of visual art include paintings, drawings,

90. See Shipley Letter. See also Quatman Letter, *supra* note 39, at 14; AIA Letter, *supra* note 51, at 8; Wright Letter, *supra* note 51, at 6; Wargo, *supra* note 15, at 476.

91. Shipley letter, *supra* note 89, at 3.

92. The Architectural Works Act was passed in conjunction with the Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit.6, 104 Stat. 5128 (1990) which recognizes the rights of "attribution" and "integrity" of visual artists. Both rights are moral rights.

93. Both acts were part of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

94. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit.6, 104 Stat. 5128 (1990) Title 6, § 603. Section 603 amends the Copyright Act of 1976 by inserting after section 106, section 106A, which in pertinent part provides:

(a) RIGHTS OF ATTRIBUTION AND INTEGRITY—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

(1) shall have the right—

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right—

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

prints, sculptures and still photographic images.⁹⁵ The works must exist in single copies or in limited editions of 200 or fewer copies that are signed or somehow identify the author and are consecutively numbered by the author.⁹⁶ Works of visual art, on the other hand, do not include works in four categories.⁹⁷

The first excluded category consists of posters, map globes, charts, technical drawings, diagrams, models, applied art, motion pictures and other audiovisual works, books, magazines, newspapers and other periodicals, databases, electronic information systems and electronic publications. These are not considered works of visual art. The second excluded category comprises merchandising items and advertising promotional and descriptive materials, and covering and packaging materials and containers. Third, works for hire are not included. And finally, works not subject to copyright protection under title 17 of the United States Code are excluded.⁹⁸

The first question that arises regarding the interrelation between the Visual Artists Act and the Architectural Works Act is whether the newly created category of "works of visual art" encompasses the newly created category of "architectural works." Are authors of architectural works granted the rights of integrity and attribution provided by the Visual Artists Act? From the definitional language of the Visual Artists Act, the answer is not certain. "Architectural works" are not expressly included under the definition of visual art works. But "architectural works" are not expressly excluded from the definition either. Because of the new subject matter category created under the Architectural Works Act, architectural works are not encompassed by the broad fourth exclusion—of works not subject to copyright protection under title 17.⁹⁹

With regard to architectural design as embodied in plans, renderings, models and the like, the Visual Artists Act should be read not to include such works. The definition excludes models and technical drawings.¹⁰⁰ Under the current definition of pictorial, graphic and sculptural works, "technical drawings" are said to include "architectural plans."¹⁰¹ Therefore, as technical drawings, architectural plans, as well as blueprints, sketches and similar two-dimensional architectural drawings, should not and undoubtedly will not be considered

95. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. 6, § 602, 104 Stat. § 128 (1990)(amending 17 U.S.C. § 101 (1989) by including the definition for "works of visual art" after the definition for "widow.")

96. *Id.*

97. *Id.*

98. See H.R. REP. NO. 514, 101st Cong., 2d Sess. 14 (1990).

99. See Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. 6, § 602, 104 Stat. § 128 (1990).

100. *Id.*

101. 17 U.S.C. § 101 (1989).

works of visual art. Additionally, the models excluded by the Visual Artists Act surely encompass architectural models.

With regard to architectural designs embodied in buildings, the answer as to whether they are works of visual art is perhaps less clear. No included work appears to encompass buildings. And unless a building was created as a work for hire, the only other type of work excluded by the Visual Artists Act that seems to encompass buildings is "applied art." By their nature and their treatment before passage of the Architectural Works Act, it would seem buildings are works of applied art.¹⁰² But, as demonstrated above, architectural works were deliberately removed from the subject matter category under which applied art is found.¹⁰³ Nonetheless, it is most likely that buildings will not be considered works of visual art.¹⁰⁴ Nor should most buildings be protectable as works of visual art.¹⁰⁵ Exception, however, should be made for buildings which pass the separability test applied to useful articles.¹⁰⁶ As evidenced by the current law, few buildings will pass this muster. Only monuments and buildings like the Guggenheim Museum might qualify for protection as works of visual art.¹⁰⁷ Embellishment with decorative ornamentation, on the other hand, should not qualify a *building itself* as a visual arts work.¹⁰⁸

Section 604 of the Visual Artists Act makes provisions for authors'

102. Herman Frankel Org. v. Tegman, 367 F. Supp. at 1053; Scholz Homes, Inc. v. Maddox, 379 F.2d 84, 85 (6th Cir. 1967); Imperial Homes Corp. v. Lamont, 458 F.2d 895, 899 (5th Cir. 1972); DeSilva Constr. Corp. v. Herrald, 213 F. Supp. 184, 196 (M.D. Fla. 1962); Schuchart & Assoc. v. Solo Serve Corp., 540 F. Supp. 928, 948 (W.D. Tex. 1982).

103. See *supra* note 67.

104. Therefore, buildings will not qualify for moral rights protection under the Visual Artists Act. Commentators supporting the concept behind the Architectural Works Act were divided on the issue as to whether architects should be granted moral rights protection. Compare Quatman Letter, *supra* note 39, at 14; and AIA Letter, *supra* note 51, at 8 ("AIA believes that moral rights are essentially unnecessary with respect to works related to architecture. . ."), with Shipley letter, *supra* note 89, at 3, and Wright Letter, *supra* note 51, at 9 ("[R]emedies should be permitted for mutilation or other alterations which could come within the meaning of moral rights under the Berne Convention.").

105. Architect's moral rights should yield to real property rights in order to lessen economic waste that may result because of the enforcement of moral rights.

106. See 17 U.S.C. § 102(a)(5)(1989); *supra* notes 36 and 59 and accompanying text.

107. *Id.* See Jones Bros. Co. v. Underkoffler, 16 F. Supp. 729, 731 (M.D. Pa. 1936) (memorial entitled to copyright because it was an object of art as well as an article of manufacture).

One court, on the other hand, even determined that a monumental work was functional. See Wickham v. Knoxville Int'l Energy Exposition, Inc., 555 F. Supp. 154, 156 (E.D. Tenn. 1983) ("economic and engineering considerations dictated the height and structural steel design of the Sunsphere tower").

108. See *infra* notes 115-17 and accompanying text.

rights in works of visual art incorporated in buildings.¹⁰⁹ The provisions basically limit the integrity and attribution rights otherwise created by the Visual Artists Act¹¹⁰ when the work of visual art is part of a building. Arguably, if Congress had intended buildings to be included in the definition of visual art works, it would not have made special provisions for visual art works incorporated in buildings.

Section 604 of the Visual Artists Act is, however, an important provision for architects and building owners and should not be passed over without serious examination. The section amends 17 U.S.C. § 113 by adding a subsection (d)(1), which states:

In a case in which—

(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the works as described in section 106(a)(3),¹¹¹ and (B) the author consented to the installation of the work in the building either before the effective date set forth in section 9(a) of the Visual Artists Rights Act of 1990,¹¹² or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal, then the rights conferred by paragraphs (2) and (3) of section 106A(a)¹¹³ shall not apply.¹¹⁴

Essentially, what this section provides is that if a visual art work was incorporated in a building before June 1, 1991, with the author's consent, or after June 1, 1991, if the author similarly consented in a signed written agreement that says the work's installation may subject it to harm if it is removed, then the author's integrity right in the work is relinquished and attribution right is substantially diminished. The difficulty here is determining what effects this section and the alterations and destruction provision of the Architectural Works

109. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. 6, § 604, 104 Stat. § 128, 5130 (1990).

110. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. 6, § 603, 104 Stat. § 128, (1990). *See supra* note 94. The extent to which the integrity and attribution rights may be limited will not be examined in this Comment.

111. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. 6, § 603, 104 Stat. § 128, (1990). *See supra* note 94.

112. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. 6, § 610(a), 104 Stat. § 128, 5132 (1990) ("[T]his title and the amendments made by this title take effect 6 months after the date of the enactment of the Act."). Since President Bush signed the Act on Dec. 1, 1990, it will take effect June 1, 1991.

113. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. 6, § 603, 104 Stat. § 128, (1990), *supra* note 94.

114. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, tit. 6, § 604, 104 Stat. § 128, 5130 (1990). The section proceeds to explain how the building owner can go about removing the visual art work from his building if it can be done without destroying, distorting, mutilating or otherwise damaging the visual art work.

Act¹¹⁵ will have upon one another.

Section 604 of the Visual Artists Act may work to limit the building owner's right to destroy or alter her building. Suppose, for instance, that the architect creates an overall design that both interiorly and exteriorly incorporates several separable works of visual art. Perhaps the building is a church and some of the separable features are a large stained glass window, bas-relief bronze doors, gargoyles and a mural spanning the length and height of an entire wall.¹¹⁶ Also suppose that the features were designed by the architect and cannot be removed without destroying, distorting, mutilating or otherwise damaging the features. Section 604 would then allow the architect *effectively* to prevent the building owner from altering—by removing the features—or destroying the building, providing the architect did not consent to permitting damage to the features.

Before passage of the two new acts just discussed, a building could be protected by copyright only if it was sufficiently embellished with decorative ornamentation.¹¹⁷ After passage of the acts, embellishment is not the key to copyrightability, but it is a necessary element for moral rights protection that may effectively and consequently protect the building itself. The architect of an embellished building may in effect have moral rights protection. The architect of an unembellished building will not.

VI. INFRINGEMENT

To establish infringement of copyright in architectural works, the test should be the substantial similarity test traditionally applied in most copyright infringement cases.¹¹⁸ The plaintiff should be required to prove the defendant "copied" the plaintiff's copyrighted work.¹¹⁹ To prove the defendant copied the work, the plaintiff should

115. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, tit. 7, 104 Stat. 5133 § 704 (1990), *supra* notes 85-91 and accompanying text.

116. The features are not applied art because architectural works can no longer be classified as "useful articles." See *supra* note 67. Instead, the features are simply works of visual art which are part of the architectural work.

Another hypothetical might involve a building which is a monument or a building like the Guggenheim Museum, either of which itself might be a work of visual art. See *supra* notes 106-07 and accompanying text.

117. See *supra* note 61 and accompanying text.

118. The Judiciary Committee and most commentators urged that the ordinary—non-heightened—substantial similarity test should be applied to determine infringement of architectural works. H.R. REP. NO. 735, *supra* note 12, at 21; Shipley, *supra* note 30, at 446; Larsen, *supra* note 44, at 172; AIA Letter, *supra* note 51, at 5; Wright Letter, *supra* note 51, at 4; Quatman Letter, *supra* note 39, at 13.

119. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946). See also *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986), *cert. denied*, 476 U.S. 1159 (1986); *Warner Bros. v. American Broadcasting Co. Inc.*, 654 F.2d 204, 207 (2d Cir. 1981).

have to show the defendant had access¹²⁰ to the copyrighted work and that the defendant's work was substantially similar to the plaintiff's.¹²¹

The substantial similarity test, before passage of the Architectural Works Act, was applied to determine infringement by reproduction of copyrighted architectural plans, drawings, models and the like.¹²² Under the Architectural Works Act, the same test should be applied to determine when the defendant's plans infringe the plaintiff's plans. Applying such a test would be no more difficult than usual.

Courts have also shown an inclination toward applying the same infringement standard to cases in which the defendant used copyrighted plans to construct a building.¹²³ Absent copying or use of plans, however, courts have not held any duplication of a building to constitute infringement.¹²⁴ Thus, no standard has been developed for determining infringement when a building is copied.

The substantial similarity test should be applied to determine whether copying of a building has occurred. First, the defendant must have had access to the building. Simply viewing a building and walking through it should be enough to constitute access.¹²⁵ To examine the similarity between the plaintiff's and the defendant's building, the factfinder should study the overall similarity between the two structures.¹²⁶ Buildings sharing similar concepts or ideas should not give rise to infringement.¹²⁷ For clear example, if evidence in a case shows only that the plaintiff and defendant each had a three-story apartment complex composed of single resident units, each containing a bedroom, bathroom, kitchen, dining area and living room, then there would be insufficient grounds upon which to find infringement. If, however, evidence further revealed that the rooms in each unit of both complexes were arranged similarly, if doors and windows were located in similar places, if other design elements were similarly arranged, if the uses of space were similar, and if these similarities were substantial, then a

120. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

121. *See Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936); *Warner Bros. v. American Broadcasting Co. Inc.*, 654 F.2d 204, 207 (2d Cir. 1981).

122. *Herman Frankel Org. v. Tegman*, 367 F. Supp. 1051, 1054 (E.D. Mich. 1973); *Scholz Homes, Inc. v. Maddox*, 379 F.2d 84, 86-87 (6th Cir. 1967)(dictum).

123. *Robert R. Jones Assoc., Inc. v. Nino Homes*, 858 F.2d 274, 276-77 (6th Cir. 1988).

124. Exception being made, of course, for monuments. *Id. See Jones Bros. Co. v. Underkoffler*, 16 F. Supp. 729, 731 (M.D. Pa. 1936)(memorial entitled to copyright because it was an object of art as well as an article of manufacture).

One court, on the other hand, even determined that a monumental work was functional. *See Wickham v. Knoxville Int'l Energy Exposition, Inc.*, 555 F. Supp. 154, 156 (E.D. Tenn. 1983)("economic and engineering considerations dictated the height and structural steel design of the Sunsphere tower").

125. Shipley Letter, *supra* note 89, at 3.

126. *See Larsen, supra* note 44, at 172.

127. *See Shipley, supra* note 30, at 446.

valid infringement claim might well exist.¹²⁸

In sum, substantial similarity should be a measure of the overall form and overall configuration, arrangement and composition of spaces, rooms and other design elements.¹²⁹ Such a standard comports with both the language of the statute and the intentions of the committee which considered the legislation that eventually became the Architectural Works Act.¹³⁰

Some commentators have suggested that the "total concept and feel" test¹³¹ should be applied to determine infringement of architectural works.¹³² The total concept and feel test, however, is not appropriate for determining infringement of architectural works. To the extent that it moves away from a study of the configuration and composition of elements and details, the concept and feel test is too nebulous a standard to apply to buildings in light of the importance of buildings' utilitarian nature and the importance of borrowing in architecture. The utilitarian nature of the subject matter makes the normal approach to infringement inappropriate. It is not, as mentioned above, the total concept of a building, but rather the overall form and configuration of all its parts that stands protected.¹³³ For example, two two-bedroom homes with pitched roofs, to the ordinary observer, might have the same total concept and feel. Without knowing more about the homes—about the arrangement of their windows, doors and other elements—a finding of infringement would allow architects to monopolize unprotectable concepts and ideas and the functional aspects of their structures.¹³⁴ Requiring a showing of substantial similarity in the overall configuration and composition of elements and space, on the other hand, would adequately prevent such monopolization and consequent stifling of creativity in and necessary borrowing of architectural design.¹³⁵

Requiring a showing of substantial similarity in the overall configuration and composition of elements and space, however, is not to suggest that the determination would be beyond the capacity of an

128. *Id.* at 447.

129. *See* *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976), *cert. denied*, 429 U.S. 980 (1976) ("the essence of the infringement lies in taking not a general theme but its particular expression through similarities of treatment, details, scenes, events and characterization.")

The traditional idea/expression dichotomy is thus maintained with the present application of the substantial similarity text to the architectural works.

130. H.R. REP. NO. 735, *supra* note 12, at 21.

131. *See, e.g., Sid & Marty Krofft Television Prod. Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977).

132. Larsen, *supra* note 44, at 172; AIA Letter, *supra* note 51, at 6; Wright Letter, *supra* note 51, at 5; Quatman Letter, *supra* note 39, at 13.

133. AIA Letter, *supra* note 51, at 6. *See also* Shipley, *supra* note 30, at 446.

134. Shipley, *supra* note 30, at 448.

135. *Id.*

ordinary observer.¹³⁶ The decision would not necessarily depend on external criteria and expert analysis.¹³⁷ Rather, an ordinary reasonable observer could consider the overall form of and configuration of elements and space in the plaintiff's and defendant's buildings—and plans—and determine whether substantial similarity exists. Additionally, whether substantial similarity and infringement occurred should be a jury question.¹³⁸

VII. REMEDIES

Crafting appropriate remedies for infringement of copyrighted architectural works undoubtedly will be no simple task, especially when a structure is involved. Again, the architect's interest in intellectual property clashes against the public's interests and the building owner's interest in tangible property.

If plans, without authorization, are reproduced only in the form of other plans, then injunctive relief should be available as it is with any other copyrighted subject matter.¹³⁹ The plaintiff should be able to have the copied plans destroyed or delivered back to the plaintiff.¹⁴⁰ These remedies would stop the infringement before it created a substantial economic harm to the plaintiff—before construction of the building had begun. The same could be accomplished by enjoining the defendants from initiating construction of the building embodying the copied design.¹⁴¹ Enjoining the initiation of construction would also be an appropriate preliminary relief while awaiting a ruling on whether the plans to be used for construction actually infringed the copyrighted plans as alleged.¹⁴² Damages should also be an available remedy when architectural plans are copied.¹⁴³

Once construction has begun, determining the appropriate remedy

136. Larsen, *supra* note 44, at 172; Quatman Letter, *supra* note 39, at 13; Herman Frankel Org. v. Tegman, 367 F. Supp. 1051, 1053 (E.D. Mich. 1973).

137. See Sid & Marty Krofft Television Prod. Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

138. Larsen, *supra* note 44, at 172.

139. See Wargo, *supra* note 15, at 437. See also 3 M. NIMMER, NIMMER ON COPYRIGHT § 14.06 (1990). Injunctive relief for copyright infringement is authorized by 17 U.S.C. § 502 (1989).

140. See Wargo, *supra* note 15, at 437.

141. Demetriades v. Kaufmann, 680 F. Supp. 658, 670 (S.D.N.Y. 1988). See also Herman Frankel Org. v. Wolfe, 184 U.S.P.Q. 819, 821 (E.D. Mich. 1974).

142. See Wainwright Sec. Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977) ("In copyright cases . . . , if probable success—a prima facie case of copyright infringement—can be shown, the allegations of irreparable injury need not be very detailed, because such injury can normally be presumed when a copyright is infringed.") See also Wolfe, 184 U.S.P.Q. at 821.

143. See Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co., 542 F. Supp. 252, 262-68 (D. Neb. 1982) (damages for infringing copying of plans consisted of actual damages—the fair market value of the plans—and the infringer's profits).

is much more complex. Destruction should be available only when it will not cause unreasonable economic waste.¹⁴⁴ For instance, it is hard to imagine and foresee a case in which a court would order destruction of a completed house.¹⁴⁵ In such a case the economic waste and harm to the probably innocent building owners would be unreasonable.¹⁴⁶ Where economic waste would be significantly less, destruction might be a more plausible option. For instance, destruction might be appropriate and reasonable in the case of a home of which only one wall has been raised or of a completed pergola.¹⁴⁷

Enjoining construction which was already underway would be a less severe remedy than destruction only if noninfringing construction to finish the work was possible. In such a case, modifications in what had been completed prior to injunction might be necessary to assure that the finished structure would not be substantially similar to the copyrighted structure.¹⁴⁸

Where either destruction or enjoined construction would result in unreasonable economic waste, the courts could and should craft an appropriate award of damages for the infringement.¹⁴⁹ Appropriate damages would include the architect's fees,¹⁵⁰ other profits the architect would have enjoyed absent duplication of her design,¹⁵¹ as well as attorneys fees and court costs.¹⁵²

VIII. PREEMPTION AND EFFECTIVE DATE

Under the Architectural Works Act, state and local laws, which relate to architectural works will be preempted like those relating to

144. Wargo, *supra* note 12, at 477. Destruction remedy authorized by 17 U.S.C. § 503(b)(1989).

145. *But see* AIA Letter, *supra* note 51, at 7. The AIA was the only respondent to the Register of Copyrights' Notice of Inquiry on architectural works that suggested destruction of a completed structure as a plausible remedy. The AIA added, however, that courts likely would use their discretion and consider the economic waste involved in fashioning such a remedy.

146. Hellmuth, *supra* note 45, at 194 ("It would be extremely wasteful and unconscionable in an era of scarcity of natural resources to allow vindictive plaintiffs to destroy any substantial edifice because of copyright infringement.").

147. *See supra* note 12.

148. Shipley Letter, *supra* note 89, at 3; Wright Letter, *supra* note 51, at 5.

149. *See* Quatman Letter, *supra* note 39, at 14. *See also* Shipley Letter, *supra* note 89, at 3.

Damages and profits remedy authorized by 17 U.S.C. § 504 (1989).

150. Shipley Letter, *supra* note 89, at 3 (damages should include the fee or commission the architect would have made if she had designed the structure in question).

151. Robert R. Jones Assoc. Inc. v. Nino Homes, 858 F.2d 274, 281 (6th Cir. 1988)("[T]he measure of damages in this case is the profits Jones Associates would have made on houses it would have sold but for Nino Homes' unauthorized duplication of the Aspen plans and Nino Homes' use of its infringing copies to build its Riverside houses.").

152. *See* Quatman Letter, *supra* note 39, at 14.

any other work with one significant exception. Section 705 of the Act, however, provides that "[s]tate and local landmarks, historic preservation, zoning, or building codes, relating to architectural works . . ." will not be preempted.¹⁵³ This provision is plain and practically sound and will not likely be subject to significant confusion.

The Architectural Works Act applies to and protects original architectural works, whether embodied in buildings, models, plans, drawings, or the like, that were created on or after December 1, 1990—the enactment date of the Act.¹⁵⁴ The Act also protects any architectural work embodied in an unpublished plan or drawing before December 1, 1990, but not yet constructed as of that date.¹⁵⁵ This latter protection, however, will terminate on December 31, 2002, unless the work has been constructed by then.¹⁵⁶

With respect to the effective date of the Architectural Works Act, some issues are likely to arise. First, what if infringing construction according to copyrighted but unpublished and unconstructed plans had already begun prior to December 1, 1990? Would the original plan be protected from additional construction? The answer should depend on the amount of construction of substantially similar work that had occurred prior to the enactment date. If the building was complete enough to be substantially similar to the original plans, then the case must fall back to the law prior to the Architectural Works Act to determine infringement and to preclude problems with retroactivity. Infringement in such a case would be of the plans, not as "architectural works," but rather as "pictorial, graphic, or sculptural works."¹⁵⁷ If, before the enactment date, the construction was not to a stage where what had been completed could be found substantially similar to the original plans, then the Architectural Works Act would apply. Therefore, further construction, which would render the building substantially similar to the original plans, would be infringement under the new Act.

Along a similar line, there arises an issue as to the amount of construction by the copyright owner—according to pre-enactment date plans—that must have occurred before December 31, 2002, in order to

153. Architecture Works Copyright Protection Act, Pub. L. No. 101-650, tit. 7, § 705, 104 Stat. 5133, 5134 (1990)(amending title 17, § 301(b)).

154. Architecture Works Copyright Protection Act, Pub. L. No. 101-650, tit. 7, § 706(1), 104 Stat. 5133, 5134 (1990).

155. Architecture Works Copyright Protection Act, Pub. L. No. 101-650, tit. 7, § 706(2), 104 Stat. 5133, 5134 (1990).

156. *Id.*

157. *See, e.g.,* Robert R. Jones Assoc. Inc. v. Nino Homes, 858 F.2d 274, 281 (6th Cir. 1988). Under the law prior to the copies used to construct, then a court might find infringement under *Nino Homes*. If the plans were not copied, then a future court would have to stretch the *Nino Homes* rule to find infringing construction according to the original plans.

salvage protection under the Architectural Works Act. The solution to this issue should rest simply on whether construction has begun. The Judiciary Committee created the twelve-year provisional period "[i]n order to encourage authors of architectural works to construct their unpublished creations."¹⁵⁸ By initiating construction, the author has plainly expressed an intention to construct the building. To deny protection to such an author would be to discourage construction.

IX. CONCLUSION

In determining copyrightability and infringement of works protected under the Architectural Works Act and in crafting appropriate remedies, the courts must carefully balance the various interests at stake. When a constructed building is involved, maintaining a stable balance will demand enhanced delicacy. Three primary interests must be considered. The first two are those traditionally considered in copyright law—the interests of the architect, as the author, on one hand, and the public, which includes architects who later will be borrowing ideas, on the other. But into this traditional balance must also be considered the significant interests of the tangible property owner, the owner of the building. This is the interest that is concerned with the "useful" aspect of buildings. By its provisions limiting the copyright owner's right to prevent pictorial representations, alteration and destruction of the building, the Architectural Works Act itself takes initial steps toward maintaining a balance. Courts must now follow suit.

By extending protection to designs embodied in buildings, the Architectural Works Act provides greater economic incentives to architects and grants architects protection comparable to that previously afforded the creators of other artistic and sculptural works. Subject to reasonable interpretation and application, the Act should protect originality and foster creativity without restraining competition or interfering with the legitimate borrowing of architectural ideas and concepts.

Additionally, the expanded protection that the Architectural Works Act provides should even benefit the building owners if the proper balance is maintained. For example, the owner of a custom-designed home or commercial building will have its investment protected from mindless duplication. Both the financial and personal value the owner has in the building will thus stand protected.

In summary, if interpreted and applied by the courts to maintain a balance among the three interests—private intellectual property, pri-

158. H.R. REP. NO. 735, *supra* note 12, at 24.

vate tangible property and public—the Architectural Works Act will create advantages for each.

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